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No. 94-1000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIRGINIA GASOLINE MARKETERS
& AUTOMOTIVE REPAIR ASSOCIATION, INC.,

Petitioner,

v.

MOBIL OIL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

PETITIONER'S REPLY BRIEF

In its brief in opposition, respondent Mobil Oil Corporation ("Mobil") raises two issues for the first time and for which a response is appropriate to fully illuminate the issues for the Court.

First, Mobil asserts that the Petitioner, Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA") should have made the Court aware of recent amendments ("the PMPA Amendments") to the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et seq., ("PMPA").[1]

Second, Mobil asserts that this Court should decline plenary review because even if petitioner is correct with regard to the PMPA claim, the special laws issue was not addressed by either VGMARA or *Amici* in their briefs and they have failed to articulate a reason why the district court's special laws decision should be reversed. [2]

I. THE PMPA AMENDMENTS DO NOT ALTER PREEMPTION ANALYSIS IN THIS CASE.

Mobil argues that VGMARA failed to disclose to the Court the recent amendments to PMPA by Congress. While on the one hand asserting that VGMARA should have made this Court aware of the PMPA Amendments, Mobil, on the other hand, acknowledges the obvious in that the Amendments have "no effect on federal preemption as provided in the 1978 Act." *See* S. Rep. No. 103-387, 103d

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[1]Petroleum Marketing Practices Act Amendments of 1994, Pub. L. No. 103-371, 108 Stat. 3484.

[2]Mobil also makes quite an issue of the fact that the Attorney General did not join VGMARA in its Petition for Writ of Certiorari. However, as this Court well knows, and as Mobil ought to know, the Attorney General remains a party in this action as a respondent pursuant to Rule 12.

Cong., 2d Sess. 2, 5. *See also* H.R. Rep. No. 737, 103d Cong., 2d Sess. 4-5, reprinted in 1994 U.S.C.C.A.N. 2779, 2782 (under amendments States still may not "in any way regulate the grounds for termination or nonrenewal of a franchise . . .unless the State statute is exactly the same as the provisions of PMPA Title I"). [3] Since the PMPA Amendments do not affect federal preemption analysis under PMPA as originally enacted, and as applicable in this case, VGMARA had no obligation to make this Court aware of the PMPA Amendments.

II. THE FOURTH CIRCUIT ELECTED NOT TO CONSIDER THE SPECIAL LAWS ISSUE.

The Fourth Circuit elected not to consider the district court's flawed special laws ruling, basing its ruling on the established principle that "courts should refrain from addressing constitutional questions unless it is necessary to do so." *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Pet. App. A16-A17. Were this Court to review this case and reverse the decision of the Fourth Circuit on the PMPA question, the Fourth Circuit would thus be required to review and rule on the special laws decision of the district court which VGMARA believes to be significantly flawed. At oral argument, one of the

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[3] Mobil also attributes, by implication, certain statements advanced by several unnamed dealer associations regarding preemption analysis to VGMARA. VGMARA's position remains the same as reflected in its petition for writ of certiorari. VGMARA speaks for itself and not by or through certain unnamed dealer associations.

judges inquired of counsel whether the court should certify the special laws question to the Virginia Supreme Court since the special laws issue arises under the Virginia Constitution. Certainly, the Fourth Circuit has this option available to it should this case find its way back to its court.

III. THE DISTRICT COURT'S SPECIAL LAWS RULING IS FLAWED.

The district court's analysis adopted Mobil's false premise that the constraints in S.B. 235 apply to *retail outlets*, or the operators thereof, rather than the parties actually regulated by the statute, the *wholesaling franchisor-refiners*. The district court's analysis, being focused on retail outlets, found no justifiable distinction between the retail outlets benefitting from the protection of S.B. 235 and those that do not.

The district court in the instant case reasoned:

> The amendments at issue in *Fredricksburg Auto Auction v. DMV*, 242 Va. 41 (1991) applied evenly to *all* auctioneers. S.B. 235, on the other hand, affects only a small subgroup of gasoline retailers.

The district court's analysis of *Fredericksburg* was wrong for two reasons. First, not *all* sellers were regulated. The state regulated *some* sellers of cars at wholesale auction to protect buyers of used cars from fraud. The *Fredericksburg* court noted that many sellers of cars were exempted from the regulation, "i.e., rental car companies,

leasing companies, financial institutions, insurance companies, fiduciaries, and private persons disposing of vehicles for their own use." *Id.* at 45, 406 S.E.2d at 25. The fact that not all sellers were regulated did not render the classification "special." The regulation applied "withouhout distinction to all who sell motor vehicles *in the regular course of business* at wholesale auctions throughout the state." *Id.* at 49, 406 S.E.2d at 27. That distinction, between those who sell vehicles in the regular course of business and those who sell vehicles only occasionally, was reasonable because "there was no history of fraud stemming from any of the exempted businesses." *Id.* at 47, 406 S.E.2d 26.

Nothing in the Virginia Constitution requires that a regulation dealing with used car sales apply to all car sellers. Neither does anything in the Virginia Constitution require that a regulation dealing with the regulation of wholesale gasoline sales apply to each and every seller.

Second, the regulation in *Fredericksburg* applied to sellers to protect buyers. There is no suggestion that such a regulation must benefit *all* buyers. Only people who obtain a judgment against a dealer based on either fraud or a violation of the dealer licensing laws received any benefit. Yet, the district court condemned S.B. 235 because not all retail outlets benefit. There is simply no requirement that a statute apply to every member of the class benefitted by it. The requirement is that the statute apply to all members of the class *burdened* by it without distinction.

The same can be said of the case at bar. S.B. 235 regulates the franchise agreements of refiners uniformly and without discrimination. The fact that some station

operators, who do not have franchise agreements, therefore do not benefit from S.B. 235 is of no more consequence than the fact that some buyers of cars, who don't have a judgment against a dealer get no benefit from the regulation involved in *Fredericksburg*. If the *Fredericksburg* court had applied the district court's logic, the regulation would be declared unconstitutional simply because not all buyers of cars were affected by the regulation - only the buyers of cars who obtained a judgment against a dealer.

Thus, under a proper special laws analysis the issue is whether the regulation is imposed on an arbitrarily chosen class, not whether the benefits of the regulation are uniformly distributed among the member of the protected class. It is *the classification* that must be "reasonable and not arbitrary" and apply "to all persons belonging to the class without distinction." *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 102, 376 S.E.2d 525, 533 (1989).

Similarly, the district court erred in its application of *Benderson Development Co. v. Sciortino*, 236 Va. 136, 372 S.E.2d 751 (1988). There, the court found certain Sunday closing laws unconstitutional because there was no justification for their disparate application to similarly situated businesses in Virginia. The closing laws covered only 20% of the businesses in the state.

Again, the district court's error in the present case is manifest. The retail outlets are the *customers* of the class of trade that is regulated -- *not the businesses subject to regulation*. Accordingly, the fact that there is a minority of similarly situated retailers who are *customers* of the regulated class is immaterial to special laws analysis. The regulation applies uniformly to the entire class regulated

and *the regulated class* represents a reasonable classification. The classification need only apply "to all of the persons *belonging to the class* without distinction." *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 102, 376 S.E.2d 525, 533 (1989).

Mobil correctly argued below that the universe of "gas stations" (retailers) is comprised of a variety of segments. For clarification, firms operating at a retail (gas station) level in the petroleum industry may be functionally classified by three criteria: (1) the degree of vertical integration of the operators, (contrast the single station dealer with the refiner operated retail outlet); (2) the industry classification of the supplier of the petroleum products they retail, (contrast a distributor supplied retailer with a refiner supplied retailer); and (3) who controls the real estate the retailer occupies, (contrast a dealer owned retail outlet with an outlet where the dealer is an oil company tenant).

These classification criteria combine to create a spectrum of retailers. At the most independent end of the spectrum would be the retailer who owns his own location and purchases gasoline from one or more independent distributor(s) engaged in price competition in the wholesale market for his business. At the least independent end of the spectrum is the retailer buying gasoline exclusively from one major oil company at wholesale prices unilaterally established by the refiner with no wholesale competition and operating on real estate controlled by the supplying oil

company.[4] The prohibitions of S.B. 235 support the competitive independence of these least independent retailers by limiting the amount of control the refiners can impose on them.

To safeguard the limited independence and competitive viability of these least independent refiner-controlled retailers facing competition (1) from more independent retailers and (2) from their own refiner-suppliers trading at retail, the general assembly correctly imposed the constraints of S.B. 235 *on all refiners engaged in wholesaling to franchised retailers.*

Respectfully submitted,

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[4] In a category by themselves are retail outlets owned, supplied, and operated by the major oil companies through employees. In support of its "special legislation" argument, Mobil argued below that the constraints of S.B. 235 do not apply to contractually constrain Mobil as to the retail outlets it operates itself with its own employees. There is no one to contract with at these locations because Mobil is the operator. Mobil already has unlimited control over its company run retail locations. This is an "apples to oranges" comparison.

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